IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 691 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KRISHNARAO BHAGIRATH PANTH

Versus

STATE OF GUJARAT

Appearance:

MR SD PATEL for Petitioner

MS RV ACHARYA GOVT. PLEADER for Resps. No.1, 2, 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 20/02/2001

ORAL JUDGEMENT

1. This is an appeal under Section 96 of the Code of Civil Procedure, 1908, challenging the judgement and decree dated 5.5.1979 recorded by the learned Second

Joint Civil Judge (SD), Vadodara in Special Civil Suit No. 45/75, under which, the learned trial Judge dismissed the suit of the appellant and directed that there shall be no order as to costs.

2. The facts of the case of the appellant - original plaintiff may be briefly stated as follows :-

The appellant - original plaintiff was serving in the Police Department of the former State of Baroda, and on merger of the then State of Baroda, the plaintiff became Government servant of the Bombay State, then on bifurcation of the State of Bombay into State of Maharashtra and State of Gujarat on 1.5.1960, the appellant - original plaintiff was absorbed in the services of the State of Gujarat.

3. The appellant has contended that he was serving as Head Clerk in the Western Railway, Baroda at the initial stage. Any way, at the relevant point of time, he was placed under administrative control of the Inspector General of Police of the State of Gujarat. It is an undisputed fact that when the appellant completed his age of 55 years, the Inspector General of Police, Gujarat had passed an order that the appellant was retired from service on completion of his 55 years of age. The said order was passed on 31st January, 1972. It seems that the appellant has accepted the said order but applied for leave preparatory to retirement and the said leave was granted by the DSP and therefore, an order was passed that he would retire from the service on completion of the said period of leave. Accordingly, the appellant was made to retire on completion of the said period of leave.

4. The appellant has challenged the aforesaid action on the part of the respondents herein on following three grounds :-

(i) After the IGP passed an order retiring the appellant from the service, the DSP granted LPR as aforesaid and extended the period of his retirement and therefore, he was continued in the said employment beyond the date of retirement order of IGP and thereafter, no fresh order was passed by the IGP retiring him from the service.

(ii) Under the Government Resolution dated 15.5.1972 all cases of review were required to be closed and the persons ordered to retire at the age of 56 and 57 years of age should be retained in service. As the said Resolution was applicable to the case of the appellant and on application of the said Resolution to the appellant, the respondents could not have made the appellant to retire at the age of 55 years.

(iii) The second order of retirement of the appellant was passed by the DSP, who was not the appointing authority and therefore, the order passed by the D.S.P. could not be treated to be legal and valid.

5. On the aforesaid grounds, it has been contended that the trial Court has not properly appreciated the aforesaid aspects of the case and therefore, the judgement and decree of the trial court are illegal, erroneous and deserve to be set aside. The appellant therefore, prays that the present appeal be allowed, the judgement and decree of the trial Court be set aside and the suit of the appellant - original plaintiff be ordered to be decreed in terms of the reliefs prayed in the plaint.

6. The appeal was admitted and notice was issued to the respondents. Ms. R.V.Acharya, learned AGP appears before the Court in response to the service of notice. I have heard the learned advocate Mr. S.D.Patel for appellant and Ms. R.V.Acharya, learned AGP for respondents. I have also perused the papers.

7. In fact, the facts are not at all in dispute that the appellant was in the employment of the respondents. He was under administrative control of IGP. The IGP had passed an order directing the appellant to retire from the service on completion of 55 yeas of age. Thereafter, the appellant applied for leave preparatory to retirement, which was sanctioned by the District Superintendent of Police. Accordingly, date of his retirement was extended by the DSP and he was made to retire from the service on completion of the said period of leave. These facts are not at all in dispute. It is

also required to be considered that the appellant has not challenged the initial order of the IGP, retiring the appellant from the service at the age of 55 years. That order dated 31.1.1972 was accepted by him. Therefore, he applied for leave preparatory to retirement. Therefore, the initial order of retirement dated 31.1.1972 stands legal and valid since the appellant has not challenged the said order at any point of time. The only question, which is required to be considered here is as to whether the ultimate order stands vitiated for continuing the appellant in service for a period beyond the date of retirement order by the IGP on the strength of the leave granted to him by the DSP.

8. I am of the view that simply because the appellant was granted leave at the fag end of the effective retirement at the age of 55 years and simply the appellant was continue in the employment of the respondents for a period beyond the date fixed by the IGP in his retirement order dated 31.1.1972, it would not be treated to be a a new appointment since the DSP was not the appointing authority of the appellant and therefore, the order passed by the DSP granting leave preparatory to the retirement to the appellant and extending the date of retirement cannot be treated to be an order of fresh appointment. It cannot be permitted to be treated to be an order by-passing, cancelling, modifying or superceding the order of the IGP asking the appellant to retire on completion of 55 years of age. DSP cannot by-pass the orders of the IGP. It may not be very much necessary for the DSP to grant leave to the appellant beyond the date of his retirement. However, when the leave was granted to the appellant at his request, the appellant cannot take advantage of this position and cannot claim that since he was continued beyond the date fixed by the IGP for his retirement, that date has already gone and therefore, when he was not actually retired on that date, he should be deemed to be continued in service. When the IGP has passed an order retiring the appellant and thereafter, the appellant applied for leave and that leave has been granted by the DSP and therefore, if his retirement date is extended till then, the order of retirement passed by the IGP cannot be treated to be nullity simply because, the appellant continued in service beyond the date of retirement ordered by the IGP. Therefore, this argument of the learned advocate for the appellant is not acceptable.

9. The second argument is that under Government Resolution dated 15th May, 1972 placed at Ex. 49, the Government had directed that the cases should not be

considered again at the age of 56 and 57 years for the purpose of premature retirement under Rule 161 of the Bombay Civil Services Rules, 1959. The learned Civil Judge has considered this aspect during the course of his judgement. This can be gathered from para 10 of the judgement, wherein, he has made it clear that the appellant has no right to continue in service after his age of 55 years. That the Government Resolution Ex. 49 dated 15th May, 1972 speaks of the review of the cases of Government servant on completion of 56 and 57 years of age. That the case of the appellant was not covered by the said Resolution Ex. 49, dated 15.5.1972.

10. On appreciating the said reasons given by the learned Civil Judge, it cannot be said that the learned Civil Judge has committed any error in interpreting the said Resolution Ex. 49. It appears that there are provisions for the review of the case at the age of 55,56 and 57 years of age for the purpose of premature retirement, therefore, the decision was taken that the cases may not be reviewed on completion of 56 and 57 years of age. This would mean that once the exercise has been undertaken for assessing the case of Government servants at the age of 55 years, it would not be necessary to re-assess the same on completion of 56 and 57 years of age. Here, the case is different. The appellant has attended the age of 55 years and the learned trial Judge has found that the appellant was found fit to be retired on completion of 55 years of age and therefore, necessary order was issued by the IGP. It is noticed that that order was accepted by the appellant and hence he applied for and obtained leave preparatory to retirement. The said finding and interpretation of the said Resolution made by the learned trial Judge therefore does not appear to be illegal, unjust and improper. Therefore, even on this count also, the appellant has no case and therefore, this argument is required to be rejected. Since this is not a case of assessment of the performance of appellant on completion of 56 or 57 years of age. The said resolution only deals with the case, of review on completion of 56 and 57 years of age meaning thereby that rule position as to the review at the age of 55 years, stands undestituted. Hence, also this argument of the learned advocate for the appellant deserves to be rejected.

11. The third argument advanced on behalf of the appellant is that after sanctioning the leave by the DSP, new date for retirement has been fixed by the DSP, meaning thereby, that under the order of the DSP, the appellant was made to retire on a subsequent date. That

the DSP was not the appointing authority and therefore, he could not have made the appellant to retire on that date.

12. Learned AGP has argued that the DSP has not passed any order directing the appellant to retire from a particular date. In fact, the DSP has simply granted leave and has directed that the appellant would retire on completion of the leave preparatory to retirement. Therefore, the DSP has not passed any order asking the appellant to retire. He has simply followed the order of the IGP but since the appellant was granted leave, the date of effect to be given to the order of the IGP has been extended by the DSP. Therefore, no second order was passed by the DSP under Rule 161 of the Bombay Civil Services Rules. The retirement order was passed by the IGP but it's actual effect was extended on account of the leave preparatory to retirement granted to the appellant. In that view of these facts, the third aspect advanced by the appellant is also not accepted, since it cannot be said that the DSP has passed an order of premature retirement of the appellant.

13. It may be noted here that the initial order of retirement under Rule 161 of the B.C.S. Rule, 1959 passed by the IGP has not at all been challenged by the appellant at any point of time on it's own merit, either before it was put to effect or even thereafter. Even in the suit itself, the said order of the IGP did not face any challenge. No appeal - revision - review or judicial proceeding was filed against that order of the IGP. On the contrary, the appellant accepted the said order of the IGP and hence applied for leave preparatory to retirement. The retirement of the appellant has been subsequently challenged on the aforesaid ground, which did not convience the trial Court and does not convience even this Court.

14. In that view of the matter, I am of the view that the learned trial Judge has properly appreciated the facts and law applicable to the case. There is no error committed by him either in law or in fact. Consequently, there is no merit in the present First Appeal and hence it deserves to be dismissed.

15. In the facts and circumstances of the present case, the present First Appeal is ordered to be dismissed. The judgement and decree of the trial Court are confirmed. However, looking to the relationship between the parties, there shall be no order as to costs.

(D.P. Buch, J.)

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